

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:12-cr-00289-JCM-PAL

8 Plaintiff,

**REPORT OF FINDINGS AND
RECOMMENDATION**

9 v.

10 TYRONE DAVIS

(Mot. Suppress – Dkt. #144)

11 Defendant.

12 Before the court is Defendant Tyrone Davis' ("Davis") Motion to Suppress Illegally
13 Obtained Evidence Pursuant to *Franks v. Delaware* (Dkt. #144) which was referred for a Report
14 of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4. The court
15 has considered the Motion (Dkt. #144), the government's Omnibus Response (Dkt. #154), and
16 Davis' Reply (Dkt. #166). Davis filed a Supplement to Motion to Suppress (Dkt. #169) with
17 voluminous attached exhibits October 19, 2015, the United States filed a Response to the
18 Supplement (Dkt. #171) on November 4, 2015, and Davis filed a Reply to the Supplement (Dkt.
19 #172) November 9, 2015. A hearing was scheduled for November 24, 2015 and continued twice
20 pursuant to stipulation. An evidentiary hearing was finally held December 21, 2015, on Davis'
21 Motion to Suppress Statements, and the court heard oral arguments on this motion to suppress.
22 After hearing arguments of counsel, the court allowed counsel for Defendant to question two of
23 the officers involved in the investigation, on the Davis' *Franks* arguments.

24 **BACKGROUND**

25 Davis is charged in an Indictment (Dkt. #1) returned August 7, 2012, with possession of a
26 firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); possession of
27 cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D); and
28

1 possession of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. §§
2 922(g)(1) and 924(c).

3 Davis was arrested July 19, 2012, by Las Vegas Metropolitan Police Department
4 ("LVMPD") robbery detectives for a robbery that occurred on June 27, 2012. Four women
5 reported that Davis had approached them and engaged them in conversation. At some point, the
6 women became uncomfortable and started to leave. The women reported that Davis approached
7 one of the women from behind, grabbed her purse and fled. Detectives learned where Davis
8 might be living and arrested him outside of his apartment complex at 6500 Vegas Drive in Las
9 Vegas, Nevada. At the time of his arrest, LVMPD detectives obtained a telephonic search
10 warrant to search his residence for evidence of the robbery.

11 While executing the first search warrant, the officers found: (1) a Browning .22 caliber
12 automatic pistol; (2) a bulletproof vest; (3) thirteen rounds of .357 caliber ammunition; (4) forty-
13 three rounds of .25 caliber ammunition; (5) thirty-three rounds of .22 caliber ammunition; (6) a
14 pistol magazine; (7) five baggies of a white powdery substance which field tested positive for 9.6
15 grams of cocaine; (8) 7.9 grams of marijuana; and (9) digital scales and baggies. A second state
16 telephonic search warrant was applied for by another detective later that same evening to search
17 a blue 1995 Oldsmobile located at the apartment complex. The second search warrant requested
18 and received judicial authorization to search for and seize a Browning .22 caliber handgun, any
19 other firearms, firearm paraphernalia, magazines, ammunition, cleaning kits and holsters,
20 narcotics and narcotics paraphernalia, and a bulletproof resistant vest.

21 This is not the first motion to suppress physical evidence filed in this case. Davis' prior
22 counsel filed a Motion to Suppress (Dkt. #31) March 18, 2013. He argued that the first search
23 warrant lacked probable cause to believe that the fruits of the robbery would be found in the
24 residence three weeks after the robbery. He also argued the search warrant application failed to
25 establish probable cause to support a search for paperwork such as rent receipts, utility bills and
26 letters showing the name of the person residing in the premises. Because the victim and
27 witnesses knew Davis and identified him by name and photo lineup, counsel also argued that the
28 police did not need the clothing the robber was wearing on the day of the robbery to establish

1 their case as the victim and three other witnesses knew him by name and identified him in a
2 photo lineup. He argued that the search warrant was obtained so the police could conduct an
3 exploratory search of the residence, that the warrant was so lacking in probable cause and so
4 overbroad that the officers could not have reasonably relied on it in good faith. The first motion
5 to suppress also sought a *Franks* hearing asserting that Detective Bruno's application for the
6 search warrant contained material misrepresentations that, in his experience, "examination of the
7 crime scene" and recovering property requested in the warrant was necessary to provide
8 evidence of the crime.

9 The government opposed the motion and the court entered a Report of Findings and
10 Recommendation (Dkt. #33) April 23, 2013, recommending denial of the motion to suppress.
11 No objections were filed and on May 21, 2013, the district judge entered an order (Dkt. #35)
12 adopting the report and recommendation in its entirety.

13 **I. The Motion to Suppress (Dkt. #144)**

14 In the current motion to suppress, Davis argues that evidence recovered from Davis'
15 apartment on July 19, 2012, should be suppressed because the officers who applied for both
16 telephonic search warrants misrepresented and/or omitted material information. Davis claims
17 that false and misleading statements were made knowingly and intentionally or with reckless
18 disregard for the truth, and that the detectives could not establish the place to be searched
19 without materially misrepresenting information in their applications.

20 Specifically, Davis claims that Detective Bruno, who applied for the first telephonic
21 search warrant, misrepresented when officers learned about Davis' address. Second, Detective
22 Bruno's application indicates that officers confirmed the address by observing Davis physically
23 enter his apartment on July 19, 2012. However, Detective Bruno's arrest report indicates that
24 Davis was observed driving into the parking lot of the complex and was stopped before he
25 entered his apartment. Third, Detective Bruno represented to the issuing judge that officers at
26 the scene conducted a "knock-and-talk" with negative contact. However, the knock-and-talk is
27 not mentioned in any subsequent reports. Fourth, Detective Bruno represented to Judge
28 Tobiasson that officers arrested Davis when he emerged from the apartment which is contrary to

1 his report that reflects that police stopped Davis in the parking lot before he entered his
2 apartment. Finally, Detective Bruno's report indicates that from July 14, 2012, to July 18, 2012,
3 officers had several conversations with a "concerned citizen" to confirm Davis' address. The
4 report belies Detective Bruno's representation to Judge Tobiasson that he did not learn of Davis'
5 current address until July 19, 2012. No information is provided about the unnamed civilian. The
6 search warrant application omitted any reference to a confidential informant.

7 A "duplicate original" search warrant is attached as Exhibit B. It indicates that probable
8 cause for the search warrant was based upon the statement of a Sergeant Melton. Sergeant
9 Melton is not mentioned in any of the discovery provided by the government. Davis believes
10 that someone altered the duplicate original search warrant "to reflect Detective Bruno's
11 representations to Judge Tobiasson made through his Application." The duplicate original
12 indicates that officers had continuous visual surveillance on the scene, but was amended to
13 indicate "officers later arrested Davis when he emerged from his apartment." This shows
14 Detective Bruno recklessly omitted material information that would have been crucial to the
15 finding of probable cause. Davis also maintains that Detective Bruno clearly misled Judge
16 Tobiasson to believe he had obtained and confirmed Davis' address through a certain method of
17 investigation by failing to disclose crucial information.

18 The second telephonic search warrant was obtained by Detective Price. Detective Price
19 related to Judge Tobiasson what officers had recovered from the initial search and stated that
20 officers froze the apartment and left the handgun, ammunition and drugs in the place to obtain a
21 second search warrant because the first warrant did not request permission to seize them. The
22 property report prepared by Detective Sazer indicates that all of the items seized from the
23 apartment were recovered at or around 18:50 hours, an hour and twenty minutes before Detective
24 Price even called to obtain the second search warrant. Additionally, a crime scene investigation
25 report was prepared at 19:15 hours which indicates that officers took digital images of the scene
26 and conducted latent testing on the firearm. These two reports show that Detective Price
27 misrepresented to Judge Tobiasson that the scene had been frozen as the reports clearly indicate
28 that the property was recovered and the crime scene processed before the warrant was obtained.

1 Finally, Detective Price deliberately misrepresented that Davis' apartment had been frozen and
2 evidence had already been recovered and the scene was being processed. Davis seeks an
3 evidentiary hearing to challenge the truthfulness of the statements contained in the affidavits.

4 **II. The Government's Omnibus Response (Dkt. #154)**

5 The government opposes the motion that Davis has not met his threshold burden of
6 showing that the affidavits contained intentionally or recklessly false statements or misleading
7 omissions, and that the affidavits do not support a finding of probable cause without the
8 allegedly false or misleading information or omissions. Suppression is only warranted if the
9 affidavits contain deliberate or reckless omissions. The government acknowledges that
10 deliberate intent to deceive or reckless disregard for the truth may be inferred from the omission
11 of material facts that would have negated probable cause. However, negligent or good-faith
12 mistakes are insufficient. Citing *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986),
13 the government argues that a *Franks* hearing must be based on more than conclusory and
14 unsupported allegations and a mere desire to cross-examine the officer.

15 The government maintains that Detective Bruno did not make any misrepresentations.
16 Detective Bruno was not present when officers apprehended Davis on July 19, 2012. Detective
17 Bruno relied on information from other officers about when and where Davis was arrested.
18 Detective Bruno did not provide information to Judge Tobiasson about the concerned citizen
19 who was an individual who claimed to work on Davis' car who confirmed where Davis lived.
20 However, the motion to suppress does not explain why this would have made a difference in
21 reaching a probable cause determination. Detective Bruno had a good-faith belief that Davis
22 lived at the apartment for which the search warrant was requested.

23 The government asserts that Davis confuses the duplicate original search warrant with the
24 telephonic search warrant declaration and search warrant return. The telephonic search warrant
25 declaration attached as an exhibit to the warrant is a template the officer used to obtain a
26 telephonic search warrant. The most reliable information about what was actually told to the
27 issuing judge on July 19, 2012, is the transcript of the conversation which is attached as Exhibit
28 B to the government's opposition.

1 The government also argues that Davis incorrectly concludes that Detective Price lied to
2 the issuing judge based on the property reports and crime scene investigation reports prepared by
3 other officers. The first search warrant was issued at 17:11 hours. The time hand-written on the
4 top of the property report is 18:50 hours, and the time typed at the top of the crime scene report
5 is 19:15 hours which is consistent with both officers arriving at the scene, not necessarily with
6 the time the evidence was collected or processed. The government argues that LVMPD was not
7 required to obtain the second search warrant because the items were found in plain view pursuant
8 to the initial search warrant. At the time of the first search, officers knew Davis resided at the
9 location and was a prohibited person who could not possess firearms, ammunition or bulletproof
10 vests. Thus, these items could have been seized based on the plain view exception to the warrant
11 requirement.

12 **III. Davis' Reply (Dkt. #166)**

13 Davis replies that the misrepresentations made concerning how and when officers
14 obtained Davis' address made a difference to Judge Tobiasson's finding of probable cause. First,
15 it is significant that after several failed attempts to obtain Davis' address, Officer Owens
16 "miraculously located a current address for Davis." Detective Bruno offered no explanation as
17 to how Owens located Davis' address after three failed attempts. Detective Bruno must have
18 believed he needed to provide the judge with a stronger basis for believing Davis lived in the
19 searched premises and therefore told the judge that officers had physically observed Davis enter
20 the apartment which was false. The officers actually stopped Davis in the parking lot before he
21 entered the apartment. Had this been disclosed, it would have diminished the judge's belief that
22 Davis resided in or had a connection to the apartment. Detective Bruno also falsely represented
23 that the officers attempted a knock-and-talk while Davis was inside the residence to reinforce the
24 likelihood that Davis resided there. These false statements bolstered probable cause and without
25 them, the warrant lacked probable cause.

26 Detective Bruno failed to disclose that he relied on information provided by an informant
27 to establish where Davis lived to provide probable cause for the place to be searched. When
28 relying on information obtained from an informant, a law enforcement officer must tell the judge

1 about the existence of the informant and why the agent believes the informant is reliable.
2 Detective Bruno provided the judge with no information at all concerning information officers
3 had from the informant concerning where Davis lived. Detective Bruno's report indicates that
4 police confirmed the address provided by Owens through a "concerned citizen" who pointed out
5 the apartment where Davis resided. This clearly implies that police were unsure that Owens had
6 successfully located Davis' address. Had Judge Tobiasson been told this, she would have been
7 uncertain whether Davis actually lived at the fourth address provided by Owens. Additionally,
8 because the concerned citizen's information "would only have helped strengthen the probable
9 cause determination" it made no sense for Detective Bruno to withhold that information from
10 Judge Tobiasson.

11 Davis argues that the government's arguments in the reply concerning the timing of the
12 crime scene analysts' report and property report are speculative. The government does not
13 represent that counsel has spoken to the authors to determine why their reports indicate they
14 were processing evidence in an apartment that was supposedly frozen. Finally, Davis argues that
15 the government cannot meet the plain view test because the initial intrusion into the apartment
16 was unlawful due to the material omissions made to obtain the first and second warrants. The
17 government's failure to address a number of his arguments warrants an evidentiary hearing.

18 **IV. Davis' Supplement to Motion to Suppress (Dkt. #169)**

19 Without leave of court, or explanation for why a supplement was necessary, counsel for
20 Davis filed a supplement October 19, 2015, which generated a response and reply. The
21 supplement asserts the court should suppress evidence obtained on July 19, 2012, because law
22 enforcement officers searched Davis' residence prior to obtaining a search warrant. These
23 arguments are based on metadata from two digital cameras which photographed Davis'
24 apartment on the day of the search. Copies of the photographs with the date and time image are
25 attached as exhibits to the supplement. Davis argues that, based on the date and time stamp, 43
26 photographs inside of his residence were taken before the first search warrant application.
27 Detective Bruno applied for the first search warrant at 17:11 hours or 5:11 p.m. Metadata for the
28 80 photographs inside of Davis' residence on July 19, 2012, show that pictures were taken

1 between 4:41 p.m. P.D.T., and 8:01 p.m. P.D.T., although the first search warrant was not
2 applied for until 5:11 p.m.

3 The second search warrant was applied for at 20:18 or 8:18 p.m. Detective Price's
4 application represented to Judge Tobiasson that the premises were frozen. However, the date
5 and time on the photographs shows this representation was false. Additionally, Detective
6 Sazer's property report indicates that the firearms and ammunition had been recovered after
7 service of the search warrant. However, the property report contains the time 18:50 or 6:50 p.m.
8 This indicates that law enforcement officers had been inside the residence and had been
9 processing evidence nearly an hour-and-a-half before Detective Price applied for the second
10 search warrant. The metadata on the photographs also indicates that CSA Smith was inside
11 Davis' residence processing the scene for latent prints while the premises was supposedly frozen.
12 The time on the report is 19:15 or 7:15 p.m. Additionally, the metadata show that law
13 enforcement agents began photographing the interior and exterior of Davis' vehicle at 7:34:29
14 p.m. which contradicts Detective Price's statement to Judge Tobiasson that officers were seeking
15 a warrant to search Davis' vehicle. In reality, the application was an attempt to cure the Fourth
16 Amendment violation that occurred when law enforcement agents conducted a warrantless
17 search of Davis' residence and vehicle.

18 **V. Government's Response to Supplement (Dkt. #171)**

19 In a footnote, the government responds that the supplement was filed after the motion
20 deadlines expired, and that Davis had the photographs in this case at the time he filed his initial
21 motion to suppress in 2013. Addressing the arguments concerning metadata, the government
22 represents that two cameras were used to take photographs in this case. A Panasonic camera was
23 used by Detective Sazer. A Canon camera was used by CSA Jeff Smith. The photos taken by
24 CSA Smith's Canon camera began at 7:19 p.m., consistent with his reported time of arrival. The
25 government represents that the time stamp on CSA Smith's Canon camera is correct. However,
26 the Panasonic camera used by Detective Sazer had not been adjusted for daylight savings which
27 occurred in March 2012. As a result, Detective Sazer's Panasonic camera is one hour behind the
28 actual time that the photographs were taken. The actual time Detective Sazer took his first

1 photograph is 5:42 p.m., after the initial telephonic search warrant was obtained by Detective
2 Bruno at 5:21 p.m.

3 The government also represents that the time recorded on Detective Sazer's property
4 report is 6:50 p.m., but the report does not have a start and end time. In this case, multiple
5 officers searched the apartment and different officers located different items. The government
6 asserts that the person filling out the report is not necessarily the person who first locates the
7 item during the search, and that many officers fill out the top of a report when the search begins
8 while others fill it out later at the precinct. The response to supplement reiterates arguments
9 made in opposition to the motion that a *Franks* hearing is not warranted and that the guns and
10 drugs seized in this case were found in plain view during execution of the first search warrant.
11 Therefore, a second search warrant was not required.

12 **VI. Davis' Reply to Government's Response to Supplement (Dkt. #172)**

13 The reply argues the court should grant an evidentiary hearing because there are
14 contested issues of fact that have been alleged with sufficient definiteness, clarity and specificity
15 to warrant one. The government's response to this supplement "underscores the contention that
16 numerous issues of contested facts exist" which require this court to resolve the important
17 constitutional issues presented in this series of motions.

18 **VII. Testimony at the Evidentiary Hearing**

19 Detective Bruno testified at the evidentiary hearing concerning Davis' motion to suppress
20 statements he gave on the date of his arrest and the following day. Detective Bruno explained
21 that he had information from other officers that Davis lived at 6500 Vegas Drive and that after
22 obtaining this information, officers conducted surveillance to confirm Davis resided at the
23 apartment. Detective Bruno testified that Detective John Owens gave him the information about
24 Davis' address. Detective Bruno also testified that Davis was arrested in the parking lot of the
25 apartment complex, not while emerging from the apartment.

26 After hearing oral argument on Defendant's request for a *Franks* hearing, the court
27 allowed defense counsel to call Detective Sazer, the officer using the camera which had metadata
28 suggesting that photographs of Davis' apartment were taken before the first search warrant was

1 obtained. The court also allowed defense counsel to call Detective Owens, the officer providing
2 Detective Bruno with information that Davis resided at the apartment at 6500 Vegas Drive.

3 **A. Testimony of Detective Sazer**

4 Detective Sazer testified that on July 19, 2012, he did not recall having any contact with
5 Davis. He could not recall if he had keys to the apartment before he entered. He did not recall
6 the time he initiated his investigation. He did not recall what camera he used to take photographs
7 of the searched premises. His recollection was refreshed by a police report. Detective Sazer
8 testified that the camera he used was a point-and-shoot camera that was issued to him by the
9 Gang Unit. He did not recall when he first got it. The equipment he has used over the years has
10 changed. When he first started with the department, he used a Polaroid.

11 The camera he used to document the search of Davis' apartment was an auto-focus which
12 did not require adjustments. It was not just assigned to him, but to the bureau. It was used by
13 others. He did not look at the time on the camera or notice that it was off. The camera does
14 everything for you. The only functions he would check was whether the batteries were providing
15 an adequate charge, and the zoom and macro feature. When the camera takes a picture, it
16 captures the image on the screen for a few seconds. He looks at the camera to check the
17 photograph, but does not look at the time stamp.

18 On cross-examination, Detective Sazer testified that he did not enter Davis' apartment
19 before the search warrant was obtained. He did not see anyone else enter the apartment before
20 the warrant was obtained. He did not know offhand how to adjust the time stamp on the camera
21 he used. He initially did not recall if there was another crime scene analyst on scene. When his
22 recollection was refreshed, he recalled that CSI Smith was present and used another camera.

23 In response to questions by the court, Detective Sazer testified that he is positive he did
24 not enter Davis' apartment before the search warrant was obtained. He only learned that there
25 was a problem with the time stamp on the camera in connection with the motion to suppress
26 brought in this case. He did not know if anyone had checked the camera to determine how the
27 error had occurred. He could not explain why the time on the camera indicated he entered the
28 apartment before the search warrant was obtained. However, he was adamant that he did not,

1 and would not, enter any apartment to photograph a searched premises until after being notified
2 the search warrant was obtained.

3 **B. Testimony of Detective Owens**

4 Detective Owens testified that on July 14, 2012, he was able to locate an address for
5 Davis. He used several law enforcement computer tools, but could not recall the specific
6 computer system he used to locate an address for Davis. He also did a criminal records check
7 because he was assisting other officers in the investigation. He did follow up trying to locate
8 Davis and went out to take a look at the apartment complex several times.

9 At the apartment complex on Vegas Drive, he came into contact with a black male adult
10 who was driving a vehicle he knew from police records was associated with Davis. Owens
11 initially thought the driver of the vehicle might be Davis. However, as he got closer to the
12 vehicle, it was clear the individual was not Davis. He did not recall the name of the individual.
13 He did not take the individual's name or record his address. He did, however, have a
14 conversation with this person. The man said he was Davis' mechanic and was working on
15 Davis' vehicle. The man also told Detective Owens that Davis was out of town and verified
16 which apartment Davis lived in by pointing to it, without providing an apartment number.
17 Detective Owens could not recall if he contacted the property manager to confirm that Davis
18 leased the apartment.

19 Detective Owens testified that he went to the apartment on July 18, or possibly the day of
20 contact with Davis. He recalled that he went out to the apartment several times looking for
21 Davis before his arrest.

22 On cross-examination, Detective Owens testified that he went to the apartment complex
23 and saw Davis sometime between July 14, and July 18, 2012. Surveilling officers saw Davis
24 pull up and enter the apartment. The officers went to the door to do a knock-and-talk, but Davis
25 did not answer the door.

26 On redirect examination, Detective Owens testified that he believed the knock-and-talk
27 occurred sometime between July 14 and July 18, 2012, but that it was possible it could have been
28 the day Davis was arrested, July 19, 2012.

DISCUSSION

I. Applicable Law

A defendant is entitled to a hearing pursuant to the United States Supreme Court's opinion in *Franks v. Delaware* where he makes a substantial preliminary showing that: (a) the affidavit in support of a search warrant contains intentionally or recklessly false statements or misleading omissions; and (b) the affidavit in support of a search warrant cannot support a finding of probable cause without the allegedly false information. *See Franks*, 438 U.S. 154, 170 (1978)); *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000). To justify a hearing, a defendant must make "specific allegations, allege a deliberate falsehood or reckless disregard for the truth, and accompany such claim with a detailed offer of proof." *United States v. Craighead*, 539 F.3d 1073, 1080 (9th Cir. 2008) (citation omitted). Intentional or reckless omissions may also provide grounds for a *Franks* hearing. *See United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2007). If a defendant makes the requisite preliminary showing, the court conducts a hearing to determine the validity of the warrant. Suppression results if, after excising the false or misleading statements from the affidavit, there is not probable cause to support the warrant. *See Franks*, 438 U.S. at 171-72.

During oral argument at the hearing on December 21, 2015, counsel for Davis argued that the court should conduct a *Franks* hearing on the first search warrant because of statements made by Detective Bruno in the application regarding the place to be searched, and information he had concerning Davis' address prior to July 19, 2012. Detective Bruno testified during the motion to suppress statements that Davis was actually arrested in the parking lot and not emerging from his apartment as the application stated. The court allowed defense counsel to call Detective Owens, the officer providing Detective Bruno with the information concerning Davis' address.

With respect to the second search warrant, defense counsel argued that an evidentiary hearing should be permitted concerning the discrepancy between the metadata on Detective Sazer's camera and the time the second search warrant was obtained. Defense counsel represented that he had since reviewed the instruction manual for the camera Detective Sazer used and that he believed it would have been evident if there was an error about the time stamp

1 on the camera. Counsel for Davis represented it would have been an easy thing for the detective
2 to correct, and that the mistake should have been evident. The court therefore allowed defense
3 counsel to call Detective Sazer.

4 **II. Analysis and Decision**

5 Davis argues there were materially false and misleading errors and omissions made in the
6 first search warrant application which mandate a *Franks* hearing and suppression. First, he
7 argues the search warrant application was wrong about when officers learned about Davis'
8 address. Second, the search warrant falsely claimed that Davis was observed physically entering
9 the apartment on Vegas Drive. Third, the affidavit was false that officers did a knock-and-talk at
10 the apartment with negative results. Fourth, the affidavit falsely claimed that Davis was arrested
11 emerging from his apartment. Fifth and finally, the affidavit contained material omissions by
12 failing to advise the issuing judge that investigating officers had conversations with an informant
13 or a concerned citizen between July 14 and July 18, 2012.

14 The first search warrant application authored by Detective Bruno was wrong in stating
15 that Davis was arrested coming out of his apartment. Detective Bruno himself testified that
16 Davis was arrested in the parking lot. However, the court finds Davis' remaining claims are
17 without merit. It is clear from the testimony of Detective Owens that a number of investigating
18 officers were involved in attempting to verify Davis' address. Detective Owens testified that he
19 got an address for Davis on July 14, 2012, using one of the police computer database systems.
20 He also testified that officers conducted surveillance at the apartment complex on Vegas Drive
21 between July 14, and July 18, 2012. He testified that he was out at the apartment complex
22 several times. On one occasion while at the apartment complex, Detective Owens had contact
23 with a black male adult driving one of the vehicles police knew from a police records check was
24 associated with Davis. The individual claimed to be Davis' mechanic and told Detective Owens
25 that Davis was out of town.

26 Detective Owens also testified that Davis was observed by surveillance officers entering
27 his apartment. The surveilling officers did a knock-and-talk, but Davis did not answer the door.

28 ///

1 Detective Owens was not sure what date the knock-and-talk occurred, but thought it was either
2 July 18, or July 19, 2012. The court found Detective Owens credible in his testimony.

3 Detective Bruno's search warrant application did not inform Judge Tobiasson about the
4 black male adult who provided additional information connecting Davis to the searched
5 premises. However, this additional information would have bolstered, not negated probable
6 cause to believe that Davis lived in the apartment. The failure to inform Judge Tobiasson of this
7 additional information does not invalidate the warrant.

8 Davis' arguments about the duplicate original were not mentioned in oral argument. It is
9 clear from a review of the exhibits attached to the government's response that the duplicate
10 original was a template or form used to prepare the telephonic search warrant application for
11 Davis' apartment. The transcript of the telephonic search warrant was attached as an exhibit to
12 the government's response and produced in discovery. The transcript of the telephonic
13 application for the search warrant with Judge Tobiasson is the best evidence of the
14 representations made to Judge Tobiasson which resulted in the issuance of the warrant.

15 Detective Sazer was unable to explain why the metadata on the camera he used to
16 photograph Davis' apartment during the search warrant reflect that photographs were taken
17 before the first search warrant was obtained. He only learned there was a problem with the time
18 stamp on the camera as a result of this motion to suppress. Detective Sazer also testified that he
19 did not check the time stamp on the camera he used to photograph Davis' apartment. He
20 testified that the only functions he checked on the camera were the zoom and macro features, and
21 that the camera was a point-and-shoot which did all the work for him. Detective Sazer was
22 adamant that he did not, and would not, enter an apartment to photograph before a search warrant
23 was obtained. The court found him credible that he did not look at the time stamp on the camera
24 and that the camera only captures the picture on the screen for a few seconds. In short, the court
25 found Detective Sazer credible that he did not enter the apartment to photograph the premises
26 until after the search warrant was obtained.

27 The court need not address Davis' remaining arguments about alleged errors or omissions
28 in the second search warrant. It is undisputed that at the time the officers were executing the first

1 search warrant they were aware that Davis was a convicted felon. The firearm, ammunition, vest
2 and drugs are all contraband that were found in plain view. Although the first warrant did not
3 authorize seizure of a firearm, ammunition, vest and drugs, the plain view exception to the
4 warrant requirement allows contraband to be seized. *Horton v. California*, 496 U.S. 128, 136-37
5 (1980) (overruling *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), to the extent *Coolidge*
6 required inadvertent discovery. The plain view exception to the warrant applies when property
7 seized was observed from a vantage point where the viewing officer had the lawful right to be,
8 and the evidentiary value of the item was immediately apparent. *Id.* Here, the initial intrusion
9 into Davis' apartment was lawful pursuant to the first search warrant, and the incriminatory
10 nature of the evidence was immediately apparent.

11 During oral argument, counsel for Davis relied on a sheet of four photographs taken
12 during the execution of the search warrant that was marked and admitted as Defendant's Exhibit
13 A. The two photographs on the right-hand side of the page show a number of items in a drawer
14 including a small black pouch with a pull string. The top right-hand photograph shows that the
15 small black pouch was opened and a white powdery substance was observed inside. Counsel for
16 Davis argued that anyone picking up that black pouch would have realized from the feel of the
17 pouch that items authorized by the first search warrant would not have been located inside.
18 However, the first search warrant authorized a search for and seizure of earrings taken from the
19 victim of the robbery. The court finds that the officers conducting the search appropriately
20 opened the black pouch to see if it contained items authorized by the first search warrant. The
21 plain view exception to the warrant applies with respect to the items of contraband found during
22 execution of the first search warrant.

23 The court need not address the Defendant's remaining arguments about the second search
24 warrant as it was an exercise in redundancy. The second search warrant was obtained in an
25 abundance of caution, but not required, under the Fourth Amendment.

26 ///


27 ///

28 ///

1 For these reasons,

2 **IT IS RECOMMENDED** that Davis' Motion to Suppress (Dkt. #144) be **DENIED**.

3 DATED this 29th day of December, 2015.

4
5 
6 PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE